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No. 10-1056

In the Supreme Court of the United States

JOHN DOE, FATHER OF MINOR DAUGHTER, H.S., *et al.*,
Petitioners,

v.

SILSBEE INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

With respect to Respondent David Sheffield:

Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the trial court's granting of Respondent David Sheffield's Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6), based on Petitioners' failure to plead any constitutionally-protected interest allegedly violated by Hardin County District Attorney David Sheffield.

PARTIES TO PROCEEDING BELOW

Petitioners:

John Doe, father of minor daughter, H.S.

Jane Doe, mother of minor daughter, H.S.

H.S., minor daughter of John and Jane Doe

Respondents:

Silsbee Independent School District

Richard Bain, Jr.

Gaye Lokey

Sissy McInnis

David Sheffield

Rakheem Bolton

Christian Rountree

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STATEMENT OF THE CASE

Petitioners seek a writ of *certiorari* from this Court, to review the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the trial court's order dismissing Petitioners' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioners attempted to plead section 1983 claims against Hardin County District Attorney, Respondent David Sheffield ("Sheffield"), based on comments he allegedly made following a grand jury's failure to indict two teenage males who Petitioners claim sexually assaulted H.S., a minor. Sheffield filed a motion to dismiss, but the trial court denied the motion and allowed Petitioners to re-plead their claims. After Petitioners re-plead their claims, Sheffield filed a second motion to dismiss, which the trial court granted on October 23, 2009. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Petitioners' complaint on September 16, 2010, concluding Petitioners failed to plead that Sheffield had violated any of Petitioners' constitutionally-protected interests. The United States Court of Appeals for the Fifth Circuit denied Petitioners' Petition for Rehearing En Banc on November 22, 2010.

STATEMENT OF FACTS

Because the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of Petitioners' complaint for failing to state a claim, the factual allegations in Petitioners' First

Amended Complaint must be taken as true. However, as set forth below, in their Petition for Writ of Certiorari, Petitioners mischaracterize the factual allegations in their First Amended Complaint.

Petitioners allege Respondents Rahkeem Bolton ("Bolton") and Christian Rountree ("Rountree") sexually assaulted H.S., a Silsbee High School student, while she was intoxicated at a party at a fellow high school student's home at approximately 2:30 a.m. on October 19, 2008. Record, USCA5 ("R.") at pp. 318, 321, 323-25.

It is undisputed Sheffield had not begun his term as the Hardin County District Attorney at the time of the alleged sexual assault. R. at p. 336. However, after Sheffield took office in January 2009, H.S.'s parents met with him to discuss presenting criminal charges against Bolton and Rountree to a grand jury. R. at pp. 336-37. Shortly thereafter, on January 27, 2009, Sheffield presented the case to the grand jury. R. at p. 337. Sheffield called H.S. and the police investigator to testify, but the grand jury did not indict Bolton or Rountree. R. at pp. 337, 338.

Petitioners claim Sheffield thereafter provided a statement to the Silsbee Bee newspaper, on the same day the grand jury failed to indict, in which he allegedly stated, "I'm not surprised by the [no-bill] decision after seeing the evidence I've been privy to." R. at p. 351. Although Petitioners claim that the foregoing alleged statement to the local newspaper was "in clear reference to H.S. and her testimony

before the Grand Jury" (Petitioners' Petition for Writ of Certiorari at p. 3), their claim lacks factual support because Sheffield's alleged statement did not reference H.S., indicate she testified, or identify who else testified.

Petitioners further claim Sheffield discussed the case with local attorney Bo Horka ("Horka"), in the presence of Horka's clerk, who is also Horka's daughter. R. at pp. 339, 351. Petitioners claim Horka's daughter told them, "Sheffield had acted skeptical of the rape claims and minimized the evidence of the incident, treating it not as a criminal act." R. at p. 339.

In their Petition for Writ of Certiorari, Petitioners suggest their First Amended Complaint alleges Sheffield disclosed what transpired before the grand jury to third parties. *See* Petitioners' Petition for Writ of Certiorari at p. 3. However, Petitioners' First Amended Complaint contains no such factual allegation. R. at pp. 339, 351 (discussing Sheffield's alleged statements to the Silsbee Bee and to Horka).

REASONS FOR DENYING THE PETITION

The trial court and the United States Court of Appeals for the Fifth Circuit correctly concluded Petitioners failed to plead that Sheffield violated any of their constitutionally-protected interests. The Court should not grant the writ of *certiorari* because the decisions of the district court and the United

States Court of Appeals for the Fifth Circuit in this case: (1) do not conflict with the decision of any other United States court of appeals or any decision of the Texas Supreme Court; (2) do not depart from the accepted and usual course of judicial proceedings as to justify this Court's supervisory power; and (3) do not decide any important question of federal law that has not been, but should be, settled by this Court, or decide any important question of federal law in a way that conflicts with relevant decisions of this Court.

1. Texas Grand Jury Secrecy Statute Does Not Create a Protected Interest for Petitioners.

Texas Code of Criminal Procedure article 20.02 (providing for grand jury secrecy) does not create any protected interest for Petitioners. *See* TEX. CODE CRIM. P. art. 20.02, attached hereto as Appendix B. Petitioners' First Amended Complaint did not even allege facts that would constitute a violation of article 20.02. For example, the alleged statements Petitioners attribute to Sheffield do not indicate he revealed any actual evidence from the grand jury proceeding; Petitioners merely allege Sheffield commented on the grand jury's decision. *See* R. at pp. 359, 351 ("I'm not surprised by the [no bill] decision after seeing the evidence I've been privy to."; "Sheffield had acted skeptical of the rape claims and minimized the evidence of the incident, treating it not as a criminal act.").

Further, Texas courts have held that prosecutors may discuss grand jury proceedings in general terms, notwithstanding article 20.02. *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 623-24 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Under the principles announced in *Stern*, the alleged statements attributed to Sheffield did not violate article 20.02 because Sheffield did not disclose who testified, the names of the accused or the victim, the names or identities of the grand jurors, or the opinions or votes of any of the individual grand jurors. *See id.* at 624.

Most importantly, even if Petitioners had alleged Sheffield violated article 20.02, Petitioners have no constitutionally-protected interest in the grand jury secrecy afforded by article 20.02. The statute expressly provides that the remedy for disclosing secret grand jury proceedings is limited to a finding of contempt of court. TEX. CODE CRIM. P. art. 20.02(b), attached hereto as Appendix B. Further, no state or federal court has ever found that article 20.02 creates a constitutionally-protected interest.

Moreover, this Court has found that article 20.02's federal counterpart, Federal Rule of Criminal Procedure 6, similarly creates no protected interest. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (dismissal of indictment not an appropriate remedy because remedies limited to contempt finding, disciplinary proceedings against disclosing attorney, or public censure through written opinion); *see also Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (there is no independent

cause of action for a violation of Rule 6 because the only remedy is a contempt finding or an injunction).

As set forth above, Petitioners do not have a constitutionally-protected interest in grand jury secrecy. Because the United States Court of Appeals' decision finding that Petitioners had no such protected interest does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings, and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

2. *Spacek v. Charles* Does Not Create a Protected Interest for Petitioners.

Petitioners mistakenly rely on *Spacek v. Charles* to establish that being free from psychological injury, without physical contact, is a protected interest. *See* Petitioners' Petition for Writ of Certiorari at p. 12. However, the *Spacek* court merely found a fact question whether the conduct at issue—threats of lethal violence that involved placing the student in a headlock and putting a handgun to his head—"went beyond mere words," as required to state a due process claim. 928 S.W.2d 88, 91, 93 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Although Petitioners clearly misrepresent the law from *Spacek*, a Texas intermediate court of appeals' opinion nevertheless

could not establish a constitutionally-protected interest that has never been acknowledged by this Court or the federal courts of appeals. *Compare with Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (physical corporal punishment implicates due process); *Taylor v. Doe*, 15 F.3d 443, 450-51 (5th Cir. 1994) (discussing when a physical injury has violated the substantive due process right to bodily integrity).

As set forth above, Petitioners do not have a constitutionally-protected interest in being free from psychological injury in the absence of physical contact. Accordingly, Petitioners' allegation that Sheffield inflicted a psychological injury, without any physical contact or injury, is insufficient to constitute a violation of any constitutionally-protected interest. Because the United States Court of Appeals' decision finding that Petitioners had no protected interest in being free from psychological injury absent physical contact does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings, and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

3. Petitioners' Alleged Reputational Injuries Are Insufficient.

Petitioners' primary complaint is that Sheffield defamed or stigmatized H.S., inflicting an emotional or reputational injury. However, defamation or stigmatization, without the violation of some other tangible interest, is not a protected interest. *Paul v. Davis*, 424 U.S. 693, 701 (1976) (case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"); *see also DePree v. Sanders*, 588 F.3d 282, 290 (5th Cir. 2009) ("mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest"); *Tebo v. Tebo*, 550 F.3d 492, 503-04 (5th Cir. 2008) (no due process violation when public employee was stigmatized because no other protected interest implicated).

As set forth above, Petitioners have no constitutionally-protected interest in grand jury secrecy, or in being free from psychological injury in the absence of physical contact. Petitioners have failed to allege the violation of any other tangible interest sufficient to make a defamation or stigmatization injury actionable. Because the United States Court of Appeals' decision finding that Petitioners had not alleged the violation of any other tangible interest (to support a defamation or stigmatization claim) does not conflict with any decision of any other court, does not depart from the accepted and usual course of judicial proceedings,

and does not decide any important question of federal law that has not been, but should be, settled by this Court or decide any important question of federal law in a way that conflicts with relevant decisions of this Court, *certiorari* should not be granted on this ground.

CONCLUSION

The petition for writ of *certiorari* should be denied because this case does not present any issue warranting the Court's review. As set forth above, this Court has defined the limits of Petitioners' constitutional interests, and Petitioners have failed to plead Sheffield violated any of their constitutionally-protected interests. For the foregoing reasons, Respondent David Sheffield respectfully requests that the petition be denied.

Respectfully submitted,

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March 28, 2011

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APPENDIX A — Texas Code of Criminal Procedure Article 20.02

Proceedings Secret.

(a) The proceedings of the grand jury shall be secret.

(b) A grand juror, bailiff, interpreter, stenographer or person operating an electronic recording device, or person preparing a typewritten transcription of a stenographic or electronic recording who discloses anything transpiring before the grand jury, regardless of whether the thing transpiring is recorded, in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, imprisonment not exceeding thirty days, or both such fine and imprisonment.

(c) A disclosure of a record made under Article 20.012 [relating to testimony of an accused], a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 [relating to witnesses' disclosure of their testimony] may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall

warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

(d) The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

(e) A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending. The defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition. All persons receiving a petition under this subsection are entitled to appear before the court. The court shall provide interested parties with an opportunity to appear and present arguments for

the continuation of or end to the requirement of secrecy.

(f) A person who receives information under Subsection (d) or (e) and discloses that information is subject to punishment for contempt in the same manner as a person who violates Subsection (b).

(g) The attorney representing the state may not disclose anything transpiring before the grand jury except as permitted by Subsections (c), (d), and (e).

(h) A subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury. This subsection may not be construed to limit a disclosure permitted by Subsection (c), (d), or (e).